

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

BROADCAST MUSIC INC,
a corporation, et al.

Plaintiffs,

v.

FOURTH QUARTER INC d/b/a
SKY BAR CAFÉ, PATRICK J. GRIDER
AND DANIEL GRIDER EACH
INDIVIDUALLY

Defendants.

Case No. 3:07CV921-MRT

**NOTICE OF FILING OF EVIDENTIARY SUBMISSIONS IN SUPPORT OF
DEFENDANTS' OBJECTION AND MOTION TO STRIKE PLAINTIFFS'
APPLICATION FOR ENTRY OF DEFAULT AND VERIFICATION BY
DEFENDANTS' ATTORNEY**

COME NOW the Defendants, by and through their undersigned attorney of record, and for further and additional opposition to Plaintiffs' Application for Entry of Default, file the attached evidentiary submissions and further show unto this Honorable Court that the Defendants rely on previously filed pleadings and/or other items filed with the Court, either by the Defendants and/or by the Plaintiffs. Defendants are not re-filing said materials as the same are already part of the record in this case. It was the clear understanding of the undersigned attorney, that no default or application for default would be taken in this action while the parties negotiated a settlement, and/or pending Defendants obtaining new or additional counsel to represent Defendants in this copyright infringement action, as the undersigned and his firm do not regularly practice copyright law. The undersigned attorney did not receive and/or review the email apparently sent by

Plaintiffs' attorney Mark Lindsay until after the application for default was filed. In further and additional support of Defendants' Objection and Motion to Strike Plaintiffs' Application for Entry of Default, Defendants' rely on the following:

1. On the 6th day of December, 2007, Defendants received the Plaintiffs' Application for Entry of Default.
2. On the 7th day of December, 2007, Defendants' attorney, David Dawson e-mailed a letter to Plaintiff attorney, Mark Lindsay, expressing shock at the Plaintiffs' Application for Default. A true and correct copy of the same is attached hereto as Exhibit "A" and incorporated herein by reference.
3. On the 10th day of December, 2007, Defendants' attorney David Dawson received an e-mail and a letter from Plaintiffs' attorney, Mark Lindsay. The e-mail contained a forwarded e-mail apparently sent on November 28, 2007. The letter referenced the forwarded e-mail and voiced the expectation that further discussions would take place concerning this case. True and correct copies of the e-mails are attached hereto as cumulative Exhibit "B" and incorporated herein by reference.
4. On the 10th day of December, 2007, Defendants' attorney filed an answer and an Objection and Motion to Strike the Plaintiffs' Application for Default.
5. On the 11th day of December, 2007, this Honorable Court set the 17th day of December, 2007 as the date of submission without oral argument of all briefs due on that date for the Defendants' Objection and Motion to Strike the Application for Default. The Defendants' brief will be submitted on or prior to the 17th day of December, 2007.
6. That one of Defendants' attorneys, namely; William David Dawson had a telephone conversation with Plaintiffs' attorney, namely; Mark Lindsay on today's date.

In said conversation Mr. Lindsay informed Mr. Dawson that his client would not allow the withdrawal of the Application for Default. However, Mr. Lindsey further conveyed to Mr. Dawson, that if Defendants would make a further offer of settlement that the application, if Broadcast Music, Inc. consented, may be able to be withdrawn.

7. That Plaintiffs are obviously attempting to leverage the Application for Default in their settlement discussions. As previously set forth in Defendants' Objection and/or Motion to Strike Application for Entry of Default, Plaintiffs' attorneys had previously represented that no default or application for default would be taken.

8. To the best of the information, knowledge and/or belief of the undersigned the statements and averments contained herein and within Defendants' previously filed Objection and/or Motion to strike Application for Entry of Default are true and correct. This is verified by the undersigned by way of this verified pleading. The original signed Verified Motion containing verification signatures will be filed with the Court on the 12th day of December, 2007.

Defendants' specifically reserve the right to supplement and/or amend these evidentiary submissions as discovery in this matter is ongoing.

Respectfully submitted this the 11th day of December, 2007.

WHITTELSEY, WHITTELSEY & POOLE, P.C.

/s/ Davis B. Whittelsey
BY: DAVIS B. WHITTELSEY (WHI-067)
Attorney for Defendant
Post Office Box 106
Opelika, Alabama 36803-0106
Tel.: (334) 745-7766
Fax: (334) 745-7666

VERIFICATION

DAVIS B. WHITTELSEY (WHI-067)
Attorney for Defendant
Post Office Box 106
Opelika, Alabama 36803-0106
Tel.: (334) 745-7766
Fax: (334) 745-7666

STATE OF ALABAMA)
 :
COUNTY OF LEE)

I, the undersigned authority, a Notary Public in and for said State at Large, hereby certify that Davis B. Whittelsey, whose name is signed to the foregoing document, and who is known to me, acknowledged before me on this day that, being informed of the contents, that each and every allegation contained within said document is true and correct to the best of his information knowledge and belief and that he executed the same voluntarily on the day the same bears date.

GIVEN under my hand and official seal this the 11th day of December, 2007.

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon the following individuals, by hand delivering a copy or by placing it in the United State mail, postage prepaid, at their correct addresses this the 11th day of December, 2007.

Gilbert E. Johnston
Johnston, Barton, Proctor, & Rose LLP
569 Brookwood Village Suite 901
Birmingham, Alabama 35209
Tel.: (205) 458-9400
Fax: (205) 9500

/s/ _____ Davis B. Whittelsey
DAVIS B. WHITTELSEY

David Dawson

From: David Dawson [dawsonlaw1@bellsouth.net]
Sent: Friday, December 07, 2007 6:29 PM
To: 'Mark Lindsay'
Subject: RE: Broadcast Music, Inc. et al v. Fourth Quarter, Inc. et. al.

December 6, 2007

Mark V. Lindsay
Colonial Brookwood Center
569 Brookwood Village, Suite 901
Birmingham, Alabama 35209

Re: BMI, et al. v. Fourth Quarter, Inc., et al.
3:07-cv-00921-MHT-CSC

Dear Mr. Lindsay,

It was my understanding that we were in agreement that we would be gathering information in an effort to negotiate and resolve this matter. The Rule 26(f) has been continued until December 17, 2007, it was my belief and hope that we would continue discussing resolving this matter until at least that date.

If this matter cannot be resolved by the 17th day of December, 2007, it is my intention to move for mediation, with negotiation continuing prior to mediation.

I am shocked that you have moved for a default judgment during these pending negotiations. I would hope that you will withdraw you pending motion for default so that these negotiations can continue.

Sincerely yours,

WHITTELSEY, WHITTELSEY & POOLE, P.C.

Davis B. Whittelsey



[Print] [Close]

From: "Mark Lindsay" <MVL@johnstonbarton.com>
To: <ddawson@wwp-law.com>
Cc: "Gilbert E. Johnston, Jr." <GJ2@johnstonbarton.com>
Subject: Fwd: RE: Broadcast Music, Inc. v. Fourth Quarter, Inc.
Date: Mon, 10 Dec 2007 17:55:42 +0000

David:

Thanks for your note. Please see the e-mail correspondence below of November 28, 2008 transmitted to you. Also see attached a reply to your note this morning. Thanks.

Mark

>>> Mark Lindsay 11/28/2007 4:07 PM >>>
Davis, David:

I am following up regarding your efforts to secure new counsel to represent the defendants in our case before Judge Thompson in the United States District Court for the Middle District of Alabama. Have you been able to secure new counsel for the defendants? At the current juncture in this case, please let us know as you as you can. I am afraid that in the event that new counsel has not entered an appearance by Monday, December 3 and the defendants have not filed an Answer by that date, then in the interest of our clients concerning the substance of the case we will unfortunately be left with no choice but to move the court to enter a default judgment against your clients. Please advise us regarding this case as soon as you can. Thanks.

Kind regards,

Mark

Mark V. Lindsay
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Attachment 1: BMI SKyBar - Letter 12-10-07 (W0626493).PDF (application/pdf)

JohnstonBarton
ATTORNEYS

December 10, 2007

VIA E-MAIL

Mr. W. David Dawson
Whittelsey, Whittelsey & Poole, P.C.
600 Avenue A
Post Office Box 106
Opelika, Alabama 36803-0106

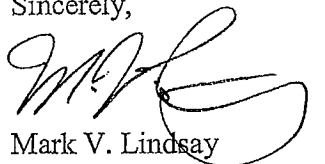
**Re: Broadcast Music, Inc. et al v. Fourth Quarter, Inc. d/b/a SkyBar Café,
Patrick J. Grider and Daniel Grider, individually,
Civil Action No. 3:07-CV-00921-MHT-CSC**

Dear David:

I received this morning your e-mail of December 10, 2007 concerning the Application for Default we filed on December 5, 2007 with the United States District Court for the Middle District of Alabama regarding the case referenced to above concerning defendants' infringement of various compositions included in the BMI repertoire.

On November 28, 2007, I transmitted to you and Davis Whittelsey an e-mail that indicated our inclination to file an application seeking default in the event that you and the defendants had not secured new counsel prior to December 3, 2007 and filed an Answer by that deadline. We hoped to hear a response to that transmission but we did not hear a reply. I look forward to discussing more with you the status regarding our case before the Court, and I hope to reach you this afternoon.

Sincerely,



Mark V. Lindsay

cc: Gilbert E. Johnston, Jr.